No. 15-35

In the Supreme Court of the United States

HOUSTON BAPTIST UNIVERSITY, EAST TEXAS BAPTIST UNIVERSITY, AND WESTMINSTER THEOLOGICAL SEMINARY, PETITIONERS,

v.

SYLVIA MATHEWS BURWELL, SECRETARY OF HEALTH & HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE STATES OF TEXAS, OHIO, ALABAMA, ARIZONA, FLORIDA, GEORGIA, KANSAS, LOUISIANA, MICHIGAN, MONTANA, NEVADA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, AND WEST VIRGINIA AS *AMICI CURIAE* SUPPORTING PETITIONERS

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INTEREST OF AMICI CURIAE

Amici are the States of Texas, Ohio, Alabama, Arizona, Florida, Georgia, Kansas, Louisiana, Michigan, Montana, Nevada, Oklahoma, South Carolina, South Dakota, Utah, and West Virginia.[1] They have a substantial interest in the participation of religious nonprofits as vibrant and vital threads in the social fabric of the States. Religious nonprofits serve their communities in a host of ways, from caring for the most vulnerable members of society, to serving the elderly with compassion, to providing the educations that allow individuals to pursue their own contributions to society. It is paramount to the *amici* States that such religious nonprofits—including the three Texas institutions here—can continue with those contributions. Erecting impediments to their continued adherence to their religious beliefs can threaten their continued work, which is driven and shaped by those beliefs.

Moreover, the States have a substantial interest in ensuring that courts do not demean religious beliefs by second-guessing religious adherents' line-drawing about what conduct is prohibited to them as sinful or immoral. The States' interest in defending the dignity

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[1] Counsel of record for the parties received timely notice of the intent to file this amicus brief. *See* Sup. Ct. R. 32.2(b). A motion for leave to file this brief is not required. *See* Sup. Ct. R. 37.4.

of religious convictions is reflected in the States' own laws. Twenty States statutorily protect religious liberty from government intrusion.[2] Others States include in their constitutions protections that go beyond rights recognized under the Free Exercise Clause of the First Amendment.[3]

The *amici* States thus have a substantial interest in protecting religious exercise from governmental intrusion. That interest is even more acute when religious practice is burdened, not by congressional enactments, but by federal executive directives that do not pursue their ends in the manner least restrictive of religious liberty, as RFRA commands. Such executive action skirts the rules laid down in a bipartisan enactment about the respect due to religious adherents in our pluralistic society.

SUMMARY OF ARGUMENT

The government already exempts from the contraceptive mandate any "grandfathered" insurance plan, meaning a plan that has not been materially

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[2] Such general laws, often called state RFRAs, have been enacted in Alabama, Arizona, Arkansas, Connecticut, Florida, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, and Virginia. *See infra* p. 27 (citations).

[3] *See, e.g.*, Ala. Const. art. I, § 3.01; *Humphrey v. Lane*, 728 N.E.2d 1039, 1043 (Ohio 2000) (holding that Article I, § 7, of the Ohio Constitution requires strict scrutiny even for a generally applicable, religion-neutral regulation that burdens religious exercise).

changed after the cutoff (which was before the contraceptive mandate was proposed). *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2766 (2014). That exemption is based on administrative burden to employers. Likewise, the government exempts every employer of fewer than 50 full-time workers; those employers collectively employ tens of millions of people. *See* First. Am. Compl. ¶ 12, *E. Tex. Baptist Univ. v. Sebelius*, No. 4:12-cv-03009 (S.D. Tex. Aug. 6, 2013).

Petitioners seek the same sort of treatment. In their case, it is based not on the secular burden of administrative inconvenience, but on a sincere religious conviction that complying with the disputed mandate is forbidden. The government already accommodates that religious conviction by providing an exemption for churches. Yet the Executive Branch contends that its denial of equal treatment to all employers with the same sincere religious conviction escapes any scrutiny at all under RFRA.

RFRA entitles petitioners to scrutiny of the Executive's justification for depriving them of that exemption. Petitioners share with churches the same religious conviction about providing health insurance without contracting with companies that will then have to pay for drugs regarded as abortifacients. The sincerity of that religious conviction is not disputed. And the Executive's regulation substantially burdens petitioners in seeking to abide by that religious conviction, as petitioners are subject to substantial monetary liability for noncompliance. Those conclusions establish that RFRA scrutiny applies.

In considering RFRA, however, several courts have departed from this Court's instructions in *Hobby Lobby*. Under RFRA's substantial-burden inquiry, courts should judge whether the government coerces a person to act in a way the person sincerely believes violates religious principle and whether the coercion is substantial. Going beyond that inquiry—attempting to judge whether the religious conviction has a truly substantial justification—will insert courts into areas reserved for religious debate. Religious adherents will not all have the same answers on such questions of morality. But for courts to privilege their views on such religious determinations over adherents' views undermines the respect and tolerance enshrined in laws like RFRA.

Whether RFRA directs such an approach to the substantial-burden inquiry is an important question deserving this Court's attention. There is no value to further delay. The issue has sufficiently percolated in the lower courts, and there is no prospect that the confusion will resolve itself with time.

A proper approach to the substantial-burden test will vindicate Congress's design. Rather than the Executive Branch side-stepping any scrutiny of how its contraceptive mandate comports with religious liberty, its regulatory means will be measured against other means that would achieve any compelling governmental interest animating them. That balancing reflects traditions of religious tolerance that are foundational to this country.

The Executive has not demonstrated that its mandate to petitioners is the least restrictive means

of achieving a compelling governmental interest, as RFRA requires. 42 U.S.C. § 2000bb-1. The Executive has already exempted churches and many other employers, showing its understanding that means less restrictive than the mandate will serve its general interest in promoting access to contraceptives. It is difficult to see any basis for finding a compelling governmental interest in regulating religious objectors rather than using whatever methods the government deems acceptable for employees of churches and other employers already excluded from the mandate. The court of appeals' judgment should be reversed.

ARGUMENT

Many employers around the country feel driven by their faith to care for their employees by providing them health insurance. But some employers find it incompatible with their religious convictions to provide that health insurance when it means contracting with a company that then, by virtue of that very relationship, becomes obligated to pay for drugs regarded as abortifacients. What matters under that religious belief about facilitation is not how the payment is made, but that the employer not take such a linking act. As this Court recognized just last year, the validity of such religious line-drawing is not for the courts to second-guess:

> This belief implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the

> effect of enabling or facilitating the commission of an immoral act by another. Arrogating the authority to provide a binding national answer to this religious and philosophical question, HHS and the principal dissent in effect tell the plaintiffs that their beliefs are flawed. For good reason, we have repeatedly refused to take such a step.

Hobby Lobby, 134 S. Ct. at 2778 (footnote omitted).

Before the contraceptive mandate, employers could abide by that religious belief by offering health insurance without engaging in an insurance relationship that would result in payment for drugs they regard as abortifacients. After the contraceptive mandate, however, some employers are unable to abide by that religious belief without incurring substantial financial liability. If they continue to engage a company to issue or administer health insurance for their employees, that company is then and only then legally required to cover drugs that the employers regard as killing human life. The supposed "accommodation" offered by the government does not change that fact, because how a hired company pays for the drugs is immaterial to this religious belief. Hence, the mandate will coerce employers to proceed with a course of action despite a belief in its religious impermissibility, because the alternative is not providing health insurance at all and thus incurring serious fines.

Troublingly, that dilemma is faced by only some employers with those religious convictions. The Executive has recognized the religious-liberty burden and therefore exempted churches (as well their integrated

auxiliaries and associations of churches) from the contraceptive mandate, relieving them of the coercion to violate their religious beliefs in providing health insurance. Those employers can still hire an insurance issuer or administrator to provide insurance for their employees without violating their religious convictions by that act bringing about coverage for drugs regarded as abortifacients. *See Hobby Lobby*, 134 S. Ct. at 2763 (noting exemption); 45 C.F.R. § 147.131 (authorizing exemption). There is no apparent reason why the religious-liberty burden that underlies this exemption for churches does not even *count* under RFRA when felt by religious charities, schools, and other nonprofits holding the same religious beliefs.

The contraceptive mandate's ongoing coercion of employers to violate their religious convictions has led to nationwide litigation and confusion about the validity of the mandate in its full reach. Challenges remain pending in multiple circuits, and the circuit and district judges who have addressed this issue have issued lengthy opinions reaching different conclusions.

The cost of that ongoing doubt about the mandate's validity is significant; it has tremendous financial and spiritual repercussions for objecting employers. Legal challenges continue to simmer nationwide, and there is no visible prospect of orderly resolution without this Court's review. In short, the question whether the alternative method of mandate compliance justifies departure from *Hobby Lobby*'s approach to RFRA is an "important question of federal law" that warrants nationwide resolution. *See* Sup. Ct. R. 10(c); *see also Gonzales v. Raich*, 545 U.S. 1, 9 (2005) ("The

obvious importance of the case prompted our grant of certiorari.").

I. There Is Little Value To Percolation: Uncertainty About How RFRA Applies To The Contraceptive Mandate Will Continue Absent This Court's Review.

The manner in which RFRA's burden test applies to the contraceptive mandate, now that the government is relying on the mandate's self-described "accommodation," is in serious dispute. *Hobby Lobby* instructs that RFRA's substantial-burden test does not allow courts to question a religious adherent's judgment that certain conduct makes the adherent morally complicit and is therefore forbidden to them. 134 S. Ct. at 2778. Under *Hobby Lobby*, the substantial-burden test instead looks at whether a regulation "demands that [practitioners] engage in conduct that seriously violates their religious beliefs," *id.* at 2775, and whether the consequences of not yielding to the regulatory command are substantial, *id.* at 2776 (noting that the fines at issue are "surely substantial"); *id.* at 2779 ("Because the contraceptive mandate forces them to pay an enormous sum of money . . . if they insist on providing insurance coverage in accordance with their religious beliefs, the mandate clearly imposes a substantial burden on those beliefs.").

The objecting nonprofits in the many cases working their way through the courts have made clear their religious conviction that they may not include certain drugs under their insurance or hire an insurance issuer or administrator that then must use its

position to pay for those drugs. No one doubts the sincerity of that conviction. Before the mandate, the religious nonprofits could adhere to that conviction. After the mandate, the nonprofits are forced to proceed in one of those two objectionable ways, or else pay a hefty fine.

Hobby Lobby's reasoning directs that this mandate constitutes a substantial burden on the objectors' religious exercise, as it triggers serious consequences for adherents who do not behave in a way contrary to their religious beliefs. Nonetheless, several courts of appeals have held that RFRA scrutiny does not even apply because no substantial burden exists.

Their reasoning creates considerable uncertainty about RFRA's scope. Some courts overlook the full religious objection by characterizing it differently. That happened below when the court of appeals concluded, "What the regulations require of the plaintiffs here has nothing to do with providing contraceptives." Pet. App. 25a. But substantial fines coerce *petitioners themselves* to make certain arrangements, and that conduct serves as a link to the coverage outcome. Petitioners are objecting that their religion views such conduct as prohibited facilitation.

Other courts move past the coercion of adherents to act contrary to religious obligations, not by recharacterizing the religious obligations, but by deeming those obligations "de minimis" or inconsequential. *See Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 249 (D.C. Cir. 2014) (concluding that the mandate only requires sending a single sheet of paper and thus that the mandate "imposes a *de*

minimis requirement on any eligible organization"); *Geneva Coll. v. Sec'y, U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 442 (3d Cir. 2015) (deeming the asserted burden insubstantial based on a "qualitative assessment" of how the regulation "imposes on the appellees' exercise of religion").

Departing from both of those approaches, five federal judges would find a substantial burden. They reject their colleagues' reasoning as amounting to a second-guessing of religious convictions that cannot be reconciled with *Hobby Lobby*. *See* Slip op. 11, *Priests for Life*, No. 13-5368 (May 20, 2015) (Brown, J., dissenting from denial of reh'g en banc, joined by Henderson, J.) (stating that no "law or precedent grants [any court] authority to conduct an independent inquiry into the correctness of this belief"); Slip op. 8, *id.* (Kavanaugh, J., dissenting from denial of reh'g en banc) (same); *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 627-28 (7th Cir. 2015) (Flaum, J., dissenting) (same); *Eternal Word Television Network, Inc. v. Sec'y, U.S. Dep't of Health & Human Servs.*, 756 F.3d 1339, 1340-41 (11th Cir. 2014) (Pryor, J., concurring) (same). And district judges have likewise disagreed with each other about proceeding in that way. *See, e.g., E. Tex. Baptist Univ. v. Sebelius*, 988 F. Supp. 2d 743, 747 (S.D. Tex. 2013) (Rosenthal, J.) ("Several district courts have already issued opinions, with inconsistent results.").

In short, substantial confusion exists in the lower courts about the proper application of *Hobby Lobby*'s holding to religious adherents who sincerely believe that either type of conduct coerced by the contracep-

tive mandate renders the adherents complicit according to their religious principles. The question has sufficiently percolated in the lower courts, yielding a variety of approaches expressed in lengthy opinions. Delay will not yield further clarity, and the issue will be argued comprehensively here. The Court should resolve the question now.

II. The Costs Of Delay Are Significant Because Religious Adherents And Not Courts Should Decide Whether Conduct Coerced By Governmental Mandates Conflicts With Their Sincerely Held Religious Beliefs.

The Court should grant review to underscore the proper standard for finding a substantial burden on religious exercise under RFRA, and it is vitally important to do so given the effects of deviating from this Court's approach in *Hobby Lobby*.

A. The Improper Substantial-Burden Test Applied Below Adjudicates The Merits Of Adherents' Religious Beliefs.

1. Religious faith and tolerance played a tremendous role in the settlement of the colonies and the founding of the United States. *See, e.g., Town of Greece v. Galloway*, 134 S. Ct. 1811, 1823-24 (2014); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 702-04 (2012). This country has a long tradition of governing so as to meaningfully protect the free exercise of religion. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523-24 (1993) (noting "the Nation's essential

commitment to religious freedom"). By allowing religious adherents exceptions that are equal to other religious and secular exceptions from regulation, our governments respect diverse faiths and govern by making compromises that avoid unnecessary friction between faith and law.

The Executive Branch, however, resists providing the religious believers here the exemption already accorded to their fellow believers in churches. Indeed, the exemption that the Executive refuses to petitioners here is narrower than the exclusion of other employers for secular, administrative reasons. Yet the Executive Branch contends that its decision is not even subject to *scrutiny* under RFRA, a bipartisan act of Congress following in our nation's tradition of reasonable compromise to respect religious freedom.[4]

The Executive Branch's method to avoid any scrutiny of its exemption denial is troubling. But despite this Court's instructions in *Hobby Lobby*, a number of federal courts have now accepted the Executive's invitation to judge for themselves the force of a religious conviction. That approach intrudes upon the dignity of adherents' convictions about profound religious concepts involving facilitation or complicity. It subjects those beliefs to judicial review, as if courts are well

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[4] RFRA had broad bipartisan support throughout the legislative process. *See* Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209, 210-11 n.9 (1994). The House and Senate later approved RFRA in an almost unanimous vote. 130 Cong. Rec. S14,471 (Oct. 27, 1993); 139 Cong. Rec. H2363 (May 11, 1993).

situated to determine the substantiality of the reasons of faith animating a believer's desired exercise of religion, as opposed to the substantiality of the governmental burden on that religious exercise. That is not the inquiry required by RFRA, and it is contrary to the spirit of religious tolerance that this country holds dear.

2. In determining whether a RFRA substantial burden exists, courts have not been permitted to assess the force of a religious prohibition against particular conduct. That determination is for religion itself to draw. Under RFRA's substantial-burden analysis, courts should instead address (1) whether the religious belief that one must act or refrain from acting in a given way is sincere, and (2) whether the challenged governmental action creates substantial coercion to act contrary to that religious conviction.

As this Court explained in *Hobby Lobby*, federal courts have no business resolving a "difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of [what the person believes to be] an immoral act by another." 134 S. Ct. at 2778. But that is what the court of appeals' analysis here does. *See, e.g.*, Pet. App. 13a n.33 (citing *Geneva College* for the proposition that "we must . . . objectively assess whether the [adherents' conduct] does, in fact, . . . make them complicit in the provision of contraceptive coverage").

The court of appeals divided the substantial-burden analysis into three parts: "(1) What is the adherent's religious exercise? (2) Does the challenged law pressure him to modify that exercise? (3) Is the penalty for noncompliance substantial?" Pet. App. 12a-13a. It held that it would defer to the religious objector on the first question, but not on the second question. Pet. App. 13a. And the court's approach to answering that second question invites judicial review of religious belief and cannot be reconciled with *Hobby Lobby*.

Significantly, the court acknowledged that petitioners ascribe to religious principles that preclude them from "provid[ing] or facilitat[ing] access to those products" viewed as abortifacients. Pet. App. 9a. And no one disputes the sincerity of petitioners' religious conviction that they may not comply with the contraceptive mandate in either of its alternative forms. *Id.* That general regulatory scheme requires employers within its scope to "offer their employees a group health plan," Pet. App. 4a, which under agency regulations means that a company retained to issue or administer that insurance must pay for drugs seen as abortifacients. Pet. App. 5a. If an employer does not comply with the executive agency's requirement, the employer "faces draconian penalties." *Id.*

RFRA's substantial-burden test does not require adjudicating anything more. In concluding otherwise, the court of appeals reasoned that it could decide for itself whether the coerced conduct—satisfaction of the contraceptive mandate using one of two methods—"pressures" petitioners to "modify" what the court viewed as core religious exercise. But petitioners have

made clear that they find either method of satisfying the contraceptive mandate religiously objectionable.

Time and again, this Court has refused to question the boundaries, importance, or validity of a person's religious beliefs. *See, e.g.*, *Emp't Div. v. Smith*, 494 U.S. 872, 887 (1990) ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim."); *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."); *Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981) ("[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation."); *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 450 (1969) (noting that courts lack authority to decide "the interpretation of particular church doctrines and the importance of those doctrines to the religion"). The Court should confirm that principle here, holding that RFRA's substantial burden inquiry gives courts no license to go beyond finding a sincere religious objection to conduct and substantial coercion to transgress it.

3. Even if courts could check for the reasonableness of an adherent's religious conviction about complicity or facilitation, the court of appeals' application of that test in this case is problematic. The court effectively second-guessed petitioners' religious objections

by finding that coercion to take a particular course of conduct does not pressure petitioners into violating their religious beliefs. Pet. App. 12a-14a.

That course of conduct is the one that the Executive calls an "accommodation." Its basic contours are important to understanding petitioners' religious objections. That method of complying with the mandate accomplishes a single end, but in different ways by distinguishing between employers who hire an insurer to assume the risk of covering healthcare expenses and employers who themselves assume that risk while hiring an administrator to process claims. As to the former: "If an employer *with an insured plan* [objects to covering contraceptives under the plan itself], the insurer must . . . provide 'separate payments' for contraceptives for plan participants. . . . In addition, it must send a notice to participants . . . that . . . the insurer provides separate payments." Pet. App. 7a (emphasis added). As to the latter: "If an employer *with a self-insured plan* [objects to covering contraceptives under the plan itself] . . . the third-party administrator . . . must either provide separate payments . . . or arrange for an insurer or other entity to do so." Pet. App. 7a-8a (emphasis added).

Under either variant of this "accommodation" method of compliance, the employer must execute a form or notice, and that mandated document "shall be an instrument under which the plan is operated, shall be treated as a designation [by the religious employer] of the third party administrator as the plan administrator . . . for [the products], and shall supersede any earlier designation." Pet. App. 8a; *see* Pet. App. 7a (legal effect of form or notice for employer who hires an

insurer). Thus, execution of that form or notice is essential to this "accommodation" method of compliance with the mandate.

Even under this method of mandate compliance, then, it is an employer's mandated act of offering a plan that generates an issuer's or administrator's legal obligation to pay for the relevant drugs. As correctly described by the court of appeals, the insurer or third-party administrator "must . . . provide . . . payments" only where the religious employer has a mandated "insured" plan or "self-insured" plan. Pet. App. 7a.

The court of appeals understood that the religious organizations here perceive a religious obligation that their offering of insurance not be used "as vehicles for payments for contraceptives." Pet. App. 21a. That obligation is founded on religious views about facilitation or enablement of what is deemed objectionable conduct, not on legal distinctions about whether the payments are made directly through a plan or by pursuant to some other duty that still applies because the employer hired a given issuer or administrator.

Nonetheless, the court of appeals concluded that the religious employers' anti-facilitation principle is unpersuasive. Although that principle rests on religious judgments, the court offered only legal distinctions immaterial to the reasons for that religious view. Specifically, the court reasoned that "the regulations prohibit" using the plans as a vehicle to facilitate the mandated coverage. *Id.* That is so, the court determined, because "[t]he payments for contraceptives are completely independent of the plans." Pet. App. 22a;

see also Pet. App. 23a (coverage is provided "separately from the plans").

Even if that assertion could somehow undermine the "justification" for petitioners' views about complicity, the characterization is belied by the court of appeals' own analysis. Absent the mandated insurance plans, the religious employers would have no insurance issuers or administrators upon whom their coverage responsibilities would devolve through the operation of the compelled self-certification. An issuer's or administrator's coverage of the drugs exists only by virtue of the plans that the religious employers are mandated to put into place, on pain of large fines. It is facilitation through that link to which the religious employers object. Put another way, far from being completely "independent" of or "separate[]" from the drug payments, Pet. App. 22a, 23a, petitioners' mandated conduct is a prerequisite for the payments.

Three basic points should resolve the burden issue:

- The religious employers' sincere "religious beliefs forbid them from . . . facilitating access to contraceptives." Pet. App. 23a.

- These religious employers are mandated to provide insurance plans that are a prerequisite to petitioners' contractors having to cover the relevant drugs. Pet. App. 7a-8a (required payment where there is an employer "with an insured plan" or "with a self-insured plan").

- A religious employer that wants to follow the dictates of conscience by not providing that link faces "draconian penalties." Pet. App. 5a.

That is enough to trigger Congress's requirement that such regulations receive scrutiny to ensure they appropriately account for those sincere religious beliefs.

Of course, not all religious believers will conclude that their conduct in directly causing payments for drugs regarded as abortifacients makes the believers complicit in those drugs' consequences, or that use of those drugs ends human life at all. But petitioners here do hold those sincere religious beliefs, and they do not rest on a legal mistake about the regulatory scheme.

Petitioners are not raising legal claims objecting to the government providing the relevant drugs directly to anyone. Instead, petitioners' objection is to the government's insistence that they themselves play a direct role in the process by virtue of offering their (mandated) insurance plans and then, as employers steered to the "accommodation" in the mandate, execute certain documentation that has operative effect. *See* Slip op. 12, *Priests for Life*, No. 13-5368 (May 20, 2015) (Kavanaugh, J., dissenting from denial of reh'g en banc) ("[I]f the form were meaningless, why would the Government require it?").

4. *Hobby Lobby* should thus resolve the substantial-burden inquiry. Indeed, the court of appeals recognized that the violation in *Hobby Lobby* arose because large penalties "compelled the *Hobby Lobby* plaintiffs to participate in providing contraceptives, albeit in an indirect way." Pet. App. 24a-25a. And the court further acknowledged that the number of "links in the causal chain" is of no import, "given that we ac-

cept an adherent's judgment as to how much separation is enough." Pet. App. 25a. But simply asserting that an employer's provision of insurance is "completely" independent (Pet. App. 22a) from the relevant coverage obligations does not make it so. And courts have no place judging whether the degree of attenuation presents meaningful religious concerns for those who must comply with the mandate.

The court of appeals' finding of "independ[ence]" and "separat[ion]" cannot trump religious adherents' beliefs regarding facilitation. Pet. App. 22a, 23a. Just as a court must respect a religious adherent's view that manufacturing sheet metal is permissible while manufacturing tank turrets makes him too complicit in wrongdoing, *Thomas*, 450 U.S. at 715, the court of appeals' own view of how much separation is enough is of no relevance here. *Hobby Lobby*, 134 S. Ct. at 2779.

Once the red herring of "complete" separation is discarded, the burden analysis here is on all fours with *Hobby Lobby*. This is not a case like *Bowen v. Roy*, 476 U.S. 693, 704 (1986), involving internal government operations and the "mere denial of a governmental benefit." Nor is it a case like *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 450 (1988), involving government road construction that had "no tendency to coerce individuals into acting contrary to their religious beliefs." *See id.* at 449 ("In neither [*Roy* nor *Lyng*] . . . would the affected individuals be coerced by the Government's actions into violating their religious beliefs"). Rather, this is a case that involves the threat of large fines if religious em-

ployers do not comply with the Executive Branch's demand to act in a way that they understand to violate their religious principles.

B. The Federal Executive's Regulatory Overreach Intrudes On Religious Liberty.

The Executive Branch's contraceptive mandate is the latest example of an attempted aggrandizement of agency authority. *See, e.g.*, *Hosanna-Tabor*, 132 S. Ct. at 706 (unanimously rejecting EEOC's suit against a church for its decisions about employment of a commissioned minister, and dismissing EEOC's "remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers"); *Horne v. USDA*, 135 S. Ct. 2419, 2427 (2015) (rejecting the Department of Agriculture's ability to seize raisins without any compensation, noting that nothing in American legal history suggests that personal property is any less protected against physical appropriation than real property); *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) (rejecting EPA's interpretation of the Clean Air Act to authorize rewriting statutory thresholds for greenhouse-gas emissions in part "because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization").

The Executive's refusal to exempt nonprofit religious organizations from the contraceptive mandate—a mandate that already excludes churches, small employers, and employers with grandfathered plans—is difficult to square with an attitude of respectful ac-

commodation of religious exercise. And the seriousness from petitioners' perspective of the Executive's unyielding mandate bears restating: Petitioners sincerely believe that compliance with this regulation is religiously forbidden because it would render them complicit in a process that in their view ends human life. Nonetheless, the coercion to comply is "draconian." Pet. App. 5a. RFRA was meant to require at least *scrutiny* of a religious adherent's claim for an exemption from such a regulation.

C. Exempting Religious Nonprofits Would Not Be Difficult And Would Afford Them Equal Treatment With Like Adherents.

Most churches, small employers, and employers with grandfathered plans are not covered by the Executive's contraceptive mandate. There is no reason to think that the Executive could not in like manner exempt religious nonprofits who identify themselves as having the same religious objection that animates the exemption for churches.

The fact that the Executive already allows so many employers an actual exemption (not an "accommodation" that is merely an alternative form of mandate compliance) is strong evidence that the government can further its interests with means less restrictive of religious liberty. The Executive cannot suggest that adherents' religious convictions differ when they meet on Sunday to determine insurance arrangements for employees of their church and when they meet on Monday to determine insurance arrangements for employees of a church-affiliated charity or

school. In the former scenario, the Executive has determined that methods other than the mandate will meet its interest in promoting access to contraceptives while respecting the religious employers' beliefs. By necessity, those same methods will achieve the government's interest while respecting other religious employers' beliefs. Indeed, the Executive has not seriously attempted to show that its alternative form of compliance with the mandate—what it calls an "accommodation"—is the method least restrictive of religious exercise for achieving a compelling governmental interest.

Rather than focusing on interests framed broadly, RFRA demands "a more focused inquiry" on "application of the challenged law to the person." *Hobby Lobby*, 134 S. Ct. at 2779 (internal quotation marks omitted); *see id.* at 2779-80 (assuming the existence of "compelling" interests framed broadly but requiring a focus on the governmental interest in the mandate to petitioners). That focus is on conscripting *these religious employers* into the government's regulatory scheme.

This cannot be the means least restrictive of religious exercise for achieving a compelling governmental interest given the existing carve-outs for numerous employers, on grounds both secular and religious. Rather than coercing employers into violating their religious beliefs, the Executive can pursue the methods it has already found acceptable with regard to employers not subject to the mandate. Those methods may be providing coverage via the government's health exchanges, providing a tax subsidy or refund, or directly

subsidizing the contraception at participating pharmacies. *See generally id.* at 2781 n.37.

D. Religious Nonprofits Are A Vital Thread In States' Social Fabric And Should Be Given Latitude To Operate In Accordance With Their Animating Religious Beliefs.

The Executive's refusal to equally exclude all religious objectors from the contraceptive mandate betrays a lack of proper concern for federal law that protects religious liberty. Religious charities, schools, and other nonprofits feel that burden heavily. *See id.* at 2785 (Kennedy, J., concurring) ("For those who choose [to believe in a divine creator], free exercise is essential in preserving their own dignity and in striving for a self-definition shaped by their religious precepts.").

The host of religious objectors to the contraceptive mandate include theological seminaries, schools and colleges, orders of nuns, and charities caring for orphans. They have avowedly religious missions, and their missions are part of what drives them to operate with a motive not to profit, but to contribute to societies across the nation in their own unique ways. The heavy religious burden that the Executive's mandate imposes on nonprofits faithfully serving their communities may well detract from the vigor with which they serve and even their willingness to serve at all. The *amici* States thus respectfully urge that the Court pay close attention to the important interests of these vital institutions.

CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment of the court of appeals should be reversed.

Respectfully submitted.

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ADDENDUM

"State RFRA" Provisions

- Arizona: Ariz. Rev. Stat. § 41-1493.01
- Arkansas: 2015 SB 975, enacted April 2, 2015
- Connecticut: Conn. Gen. Stat. § 52-571b
- Florida: Fla. Stat. § 761.01 et seq.
- Idaho: Idaho Code § 73-402
- Illinois: 775 Ill. Comp. Stat. § 35/1 et seq.
- Indiana: 2015 SB 101, enacted March 26, 2015; 2015 SB 50, enacted April 2, 2015
- Kansas: Kan. Stat. § 60-5301 et seq.
- Kentucky: Ky. Rev. Stat. § 446.350
- Louisiana: La. Rev. Stat. § 13:5231 et seq.
- Mississippi: Miss. Code § 11-61-1
- Missouri: Mo. Rev. Stat. § 1.302
- New Mexico: N.M. Stat. § 28-22-1 et seq.
- Oklahoma: Okla. Stat. tit. 51, § 251 et seq.
- Pennsylvania: 71 Pa. Stat. § 2403
- Rhode Island: R.I. Gen. Laws § 42-80.1-1 et seq.
- South Carolina: S.C. Code § 1-32-10 et seq.
- Tennessee: Tenn. Code § 4-1-407
- Texas: Tex. Civ. Prac. & Rem. Code § 110.001 et seq.
- Virginia: Va. Code § 57-1 et seq.